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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re H.W., a Person Coming Under the  
Juvenile Court Law.

B216710  
(Los Angeles County  
Super. Ct. No. YJ30842)

THE PEOPLE,

Plaintiff and Respondent,

v.

H.W.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County,  
Charles Scarlett, Judge. Affirmed.

Laini Millar Melnick, under appointment by the Court of Appeal, for  
Defendant and Appellant.

No appearance for Plaintiff and Respondent.

H.W. appeals from the order declaring him a ward of the court (Welf. & Inst. Code, § 602) by reason of his having committed one count of first degree, willful, deliberate, premeditated murder (Pen. Code, § 187)<sup>1</sup> during which he personally discharged a firearm proximately causing great bodily injury or death (§ 12022.53, subd. (d)) and one count of attempted willful, deliberate, premeditated murder (§§ 664 & 187) during which he intentionally discharged a firearm (§ 12022.53, subd. (c)). The juvenile court ordered H.W. committed to the Division of Juvenile Justice for a maximum term of confinement of 50 years. We affirm the juvenile court's order.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### *1. Facts.*

##### *a. The prosecution's case.*

On the afternoon of July 23, 2008, Chris H., a member of the South Side Compton Crips, was “hanging with a few of [his] friends” as he was driving his car toward 74th and Main Street. As he drove, Chris H. saw 13-year-old H.W., whom he knew as K-Swiss, “walking,” “pacing” and “talking like he was mad.”<sup>2</sup> H.W. told Chris H. he was angry because some Swans “had jumped his sister.” When a young man named Derrick D. then walked up and began talking with H.W., Chris H. drove away.

On his way back approximately an hour later, Chris H. again saw Derrick D. and H.W. Derrick D. was carrying a rifle with a scope on it and the two youths were walking toward an alley. Chris H. attempted to tell H.W. not to do it and that it was “not going to make the situation any better.” However H.W. and Derrick D. continued to walk down the alley. H.W. told Chris H. that he was going to rectify the situation involving his sister and continued to walk toward 76th Street, which is where gang members belonging to the Swans hang out. After climbing over three separate fences, H.W. headed for some

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> Chris H. testified that “K-Swiss” stood for “[k]ill a Sway when I see a Sway.” A Sway is a member of a street gang called the Swans. The Swans are affiliated with the Bloods gang.

apartments located at the end of an alley. Derrick D., who remained at the last gate, handed the rifle over to H.W. After H.W. made a hand signal indicating he was from the Crips gang and was going to “[b]ang on somebody,” Chris H. decided to leave the area. As he drove away, he heard one gunshot fired.

Later that evening, H.W. went to Chris H.’s house at 74th and Main Streets. H.W. told Chris H. that he had “fucked up” and was “going to turn hi[m]self in.” He indicated that he had accidentally shot his cousin.

The following evening, Chris H. went to the 77th Street Police Station to see Detective Michael Oppelt. Chris H. went to see the detective because he was concerned about his van and his house. Someone had broken the windows in his van and he had been “jumped” the night before. Chris H. told Oppelt that he had gone to sleep at a friend’s house and that when he woke up that morning, Derrick D. was there.

Portions of Chris H.’s interview with the detective were read into the record. During questioning, Chris H. had given some answers which conflicted with his later testimony at trial. For example, he told the detective that, on the night of the shooting, he watched while standing alone at the end of the alley. He was not in a car with friends. The only other person there was his friend Rakia, who had remained in the car which was parked some distance away. In addition, during the interview Chris H. stated that, on the night of the shootings, he was “behind K-Swiss and Derrick [was] right [there], trying to hold K-Swiss back.” When defense counsel then asked Chris H., “Are you still telling us that you weren’t walking down the alley with him[,]” Chris H. responded, “Yes, Sir.” Chris H. testified that he had remained standing by a gate. Finally, during his interview with the detective Chris H. stated that he was still in the alley when H.W. fired the shot. At trial, Chris H. testified that he knew H.W. had been the shooter.

Chris H. testified that he did not “exactly remember” why he had gone to talk to the detective that night, except that he was “concerned for the van and [his] house.” Chris H. also wished to find out whether the police had any evidence against Derrick D.

Two years earlier, in March of 2007, Chris H. had suffered a “juvenile conviction” for assault with a deadly weapon on a police officer. In 2005, he had been found to have

committed battery, during which he inflicted serious bodily injury. Chris H. and Derrick D. had served time together in juvenile hall.

At the time of H.W.'s trial, Derrick D. was in custody. He had been found to have committed a "theft-related offense."

On July 23, 2008, Derrick D. had spent the day with his cousin who lived on San Pedro Street between 74th and 75th Streets. For a time, Derrick D. had gone to the home of a woman named Yvonne Rock to watch some television. At approximately 4:30 p.m., as he was leaving Rock's home, Derrick D. saw H.W. H.W. was angry because his sister had been "jumped" by members of the Swans gang. The Swans are affiliated with the Blood gang and H.W. is a member of the 73rd Street Crips. H.W. was carrying a "sniper rifle" and he told Derrick D. that he intended to "get th[o]se guys because they had jumped [his] sister." Derrick D. told H.W. "not to do anything stupid" and not to get caught.

H.W. let Derrick D. hold the gun and examine it. At that time, it was not loaded. However, H.W. was holding some bullets in his hand.

Derrick D. hung out with H.W. for the remainder of the afternoon. They were in Derrick D.'s cousin's backyard, which borders the alley between 74th and 75th Streets. At approximately 7:30 p.m., H.W. told Derrick D. that he was going to "go get them" and that he needed someone to go with him. As H.W. walked toward the apartment building where the shooting occurred, Derrick D. accompanied him. According to Derrick D., he repeatedly told H.W. that he "shouldn't do this." However, H.W. was not convinced. He and Derrick D. walked down the alley way until they came to a group of approximately four or five people inside a yard behind an apartment building. One man was outside the gate and standing in the alley. At that point, H.W. called out, "What's up cuz[,] " pulled the rifle out from behind him, then pulled the trigger, causing the gun to fire. After he fired the gun, H.W. and Derrick ran from the area. They ran down the alley, jumping over fences just as they had done to get to the apartment where the shooting occurred. After telling H.W. that he should leave the gun in a nearby van, Derrick D. ran to his cousin's house, then to Rock's apartment. After placing the rifle in the back of Derrick

D.'s aunt's pick-up truck, H.W. showed up at Rock's home. However, after H.W. told Rock what he had done, she told H.W. and Derrick D. to leave her house. Rock was on probation and did not want any trouble. After leaving Rock's apartment, Derrick D. went to his cousin's home on 112th Street.

On the afternoon of July 23, 2008, Rock was with H.W.'s sister, whom she referred to as Crafty. The two women were walking down San Pedro Street, taking Crafty's four-year-old brother home to his mother's house. As they passed by a hamburger stand, four guys from the Bloods gang "started messing with [Crafty]." The young men called Crafty names and one of the boys said it was "all right." The "next time they [caught] her slipping, they [were] going to blow her head off." Crafty continued to walk until one of the young men ran up to her and began a physical fight. Two boys approached Rock and began to fight with her. Crafty's four-year-old brother ended up face down in the street. After the fight, Crafty picked up her baby brother and headed toward her uncle's home. Rock left Crafty and returned to her apartment. According to Rock, Crafty "went her way and I went mine." Rock believed the young men who had attacked them were from the Swans gang.

Approximately 20 minutes after Rock arrived back at her apartment, H.W. came by. He was carrying a large bag of clothes with a rifle inside. He told Rock that the rifle had been a gift to him from his grandmother. Rock took the rifle from H.W. and put it up in a closet. She told him he was too young to be carrying a gun on the streets and that he would get into trouble if he were stopped by police officers. After Rock told H.W. about the fight she and Crafty had gotten into with the young men outside the hamburger stand, H.W. left Rock's apartment. Later, while Rock was at the market, H.W. returned to her apartment and retrieved the rifle.

After the shooting, police officers came to Rock's apartment building and questioned the occupants. When they asked if anyone had heard the gunshot fired, Rock said nothing. In addition, the officers had referred to a "little girl" who had been shot when, as far as Rock knew, H.W. had shot a man. Later that night, Chris H. came by Rock's apartment looking for H.W. Chris H. told Rock that "it was floating around the

neighborhood that [H.W.] had just shot somebody, and his homeboy[s] supposedly [were] mad at him and want[ed] to beat him up.” Rock told Chris H. that H.W. was not there.

Rock testified that she had been convicted of the felony of infliction of injury upon a spouse. She was also a member of the Front Hood gang from Compton which is affiliated with the Crips gang.

Brittnee T., who is called “Crafty,” is H.W.’s sister. At approximately 2:00 p.m. on July 23, 2008, Brittnee T. and Rock were walking Brittnee T.’s four-year-old brother home. On the way, they were attacked by a group of young men. The fight ended when Brittnee T.’s uncle and some other individuals came out of their homes to see what was going on. Brittnee T. then quickly collected her brother and took him home.

Early the following morning, Brittnee T. was interviewed by police officers. At trial, she claimed it was not true that she told the officers that she left her house at approximately 6:00 p.m. and “made it back to 74th around 7:00 that evening.” It was also not true that she told the police that when she got to “that location, [that] everyone was saying that [her] brother just shot at some Swans.” It was not true that she had gone to her “big homie’s” house and answered her big homie’s cell phone. Brittnee T. testified it was not true that she went to go meet her brother and that he told her that he had shot at a Swan. It was also not true that H.W. told Brittnee T. that he had shot a guy in the shoulder. It *was* true that Brittnee T.’s mother told her that her young cousin had been shot. Brittnee T. had made the false statements to a police officer because she had been told to do so by a boy she knew as “Scraps.” The boy’s first given name is Chris. Scraps, or Chris, told Brittnee T. that if she did not go make the statement to police she would be beaten or shot. Brittnee T. blamed H.W. for the shooting because she was afraid of being hurt.

At approximately 8:30 p.m. on July 23, 2008, Nataly R. was visiting a friend in the area of 76th and San Pedro. She was standing in the front yard of her friend’s home when she saw two young men walking up the side alley. One of the boys was holding a “big, big rifle.” As the two young men approached a gate in the alley, one of them yelled

out something like “hey, Cuz,” then fired the rifle at a young man standing in the alley in front of an apartment building. Nataly R. heard one gunshot, then ran back inside the house. As she was running, Nataly R. heard someone from the apartments scream, “My baby[.]”

On the evening of July 23, 2008, Los Angeles Police Officer Joseph Broussard was assigned to a “crime scene for a shooting.” While he was standing outside his patrol car at the mouth of the alley by San Pedro and 74th Streets, Broussard was approached by Brittnee T. She told the officer that her brother “had come home and advised her that he had just shot at some Swan Gang members in the area of 76th and San Pedro. She stated that she was later watching the television, and she realized that there was a shooting where a 6-year-old child was killed in that area . . . . She said she later saw or talked to her brother, and he had made a statement to her that he didn’t mean to shoot the little girl. She then proceeded to tell [the officers] his name was [H.W.] and that he was in a parking structure at 75th and Main.” Broussard and several other officers went to the parking structure and, in a parked van, found several young men, one of whom was H.W.

Los Angeles Police Officer Gregory Smith was on patrol in the area of 76th and Avalon, which is one block east of San Pedro, when he heard a single gunshot. In response to a radio call, the officer went to the apartment building where the shooting had occurred. Smith proceeded to apartment No. 3, where the victim was. There was blood on the steps leading to the apartment and, when the officer went inside, he discovered a young girl with a gunshot wound to her upper torso lying on the living room floor. The girl was not conscious and did not appear to be breathing. Smith radioed for an ambulance, then cleared the crowd of people from the apartment. When the ambulance arrived, the paramedics immediately transported the girl to the hospital.

When the officer was shown a photograph of the gate leading to the apartment complex, he noted that one of the bars had been damaged, as though it had recently been hit by a bullet. In the background were the stairs leading to apartment No. 3.

Detective Oppelt investigated the July 23, 2008 shooting. He arrived at the crime scene at approximately 11:20 p.m. During his investigation, Oppelt, too, saw what he

believed to be bullet impact marks on various bars of the fence leading to the apartment building where the victim was shot. One such mark showed “a very fresh impact.” The mark on the fence, coupled with the blood stains on the steps and the size and location of the decedent’s wound were consistent with “a shot having been fired from the middle of 76th Street somewhere near the mouth of the alley.” The detective explained that, “[i]n this case, . . . , the wound in [Jasmine S.’s] chest was larger than what normally would have occurred, which led [the detective] to believe that[,] coupled with the impact mark on the bar [of] the fence, it had struck that bar, and then the round, for lack of a better term, tumbled or spun; and [rather than making a clean entry, it] cause[d] a larger, more gaping, devastating wound.”

The detective, accompanied by Officer Smith, went to the other end of the alley. There, in the bed of a pick-up truck in a parking lot for an apartment complex on San Pedro, the officers found a loaded, bolt action rifle with an expended shell casing in the chamber.

Dr. Yulai Wang is a deputy medical examiner at the Los Angeles County Coroner’s office. He performed an autopsy on the body of Jasmine S. on July 26, 2008. Jasmine, who was eight years old at the time of her death, died as the result of a single gunshot wound to her chest. Wang indicated that the “entrance wound was at the front of the left chest, with . . . internal injuries to the heart, lung, and the liver and causing severe bleeding.” Wang also noted that, due to the nature of the injury, it was likely the bullet “hit an intermittent target before it entered her body.” In addition, “because [of] the nature[] of the injuries, . . . , the extensive fragmentations of the bullet,” it was most likely that the gun used was a rifle.

It was stipulated that H.W. “was placed on the community detention program on July 18th, 2008, and was to be at 1253 East 47th Street in Los Angeles in L.A. County and that on July 23rd, 2008, [H.W.] was still on the community detention program, still supposed to be at that address, and [had] left 1253 East 47th Street in Los Angeles in L.A. County at 4:19 p.m.” It was further stipulated that, “at the time of the crimes alleged in the petition as to counts 1 and 2, that on July 23rd, 2008, [H.W.] . . . knew the



wrongfulness, criminality, and potential consequences of attempting to kill a human being by firing a rifle and killing a person with a gunshot wound as a result of firing that rifle, and that the requirements, as specified in [the] ‘*In re Gladys R.*’ 1 Cal.3d 855, 1970 case, [had been] met in this case as to counts 1 and 2[.]”<sup>3</sup>

b. *Defense evidence.*

Thirteen-year-old G.B. witnessed the July 23, 2008 shooting and remembered speaking to police officers about it. He did not, however, remember the details of the shooting or what he told the officers. When shown his written statement indicating that he saw a man called Ghetto pull out a large gun from under his shirt and start shooting at the apartment complex, G.B. acknowledged that he had written it.

Los Angeles Police Detective Salaam Abdul assisted in the investigation of the July 23, 2008 shooting of Jasmine S. As part of the investigation, Abdul interviewed G.B. at the 77th Street Police Station at 2:05 a.m. on July 24. G.B. told the detective that he had seen a man known as “Ghetto” shoot Jasmine S. G.B. had witnessed the shooting from across the street. He had heard two shots fired. G.B. believed Ghetto had intended to shoot his, G.B.’s, uncle. G.B. knew Ghetto because he had seen him around the neighborhood and the two had played basketball together. G.B. told Abdul that he was “a hundred percent” certain that the shooter was Ghetto. However, when G.B. was shown a photograph of Larry T., who is known as Little Ghetto, he did not make an identification. When G.B. was shown a photograph of an individual known as Big Ghetto, he identified it, stating that it was of the man who fired the shots on July 23, 2008.

Rafael Medina is a forensic print specialist for the Los Angeles Police Department. On July 24, 2008, Medina had gone to the intersection of San Pedro and 76th Streets where he dusted various objects for finger and hand prints. One of the items

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<sup>3</sup> In *In re Gladys R.* (1970) 1 Cal.3d 855, 867, the court held that Welfare and Institutions Code section 602 “should apply only to those . . . over 14 and may be presumed to understand the wrongfulness of their acts and to those under the age of 14 who clearly appreciate the wrongfulness of their conduct.”

dusted was a truck parked in the backyard of an apartment nearby. Medina was able to lift four prints suitable for analysis from the rear portion of the truck. One of the prints was of such good quality that it could be submitted to the Department's "fingerprint computer." The result showed that the print had been made by Derrick D. In addition, two prints were lifted from the rifle. However, those prints were of such poor quality that they could not be identified.

## *2. Procedural history.*

On July 29, 2008, a Welfare and Institutions Code section 602 petition was filed alleging that H.W. committed the murder of Jasmine S. in violation of section 187, subdivision (a). It was further alleged that, during the commission of the crime, H.W. personally and intentionally discharged a firearm, a handgun, which caused great bodily injury and death to Jasmine S. within the meaning of section 12022.53, subdivisions (d), (c) and (b). In a second count it was alleged that H.W. committed attempted willful, deliberate, premeditated murder in violation of sections 664 and 187, subdivision (a) in that he attempted to murder Sharnein P. and that he personally discharged a firearm in violation of section 12022.53, subdivisions (d), (c) and (b) during the offense.

On December 2, 2008, H.W. made a motion to suppress all statements made to officers of the Los Angeles Police Department and any subsequent statements made to probation officers. On January 16, 2009, after reviewing transcripts of questioning by police officers during which H.W. equivocally indicated that he wished to tell the officers what happened after being read his *Miranda*<sup>4</sup> rights, even though an attorney could not be provided at that time, the trial court granted his motion (§ 1538.5).

At proceedings held on April 17, 2009, the juvenile court found the allegations of the Welfare and Institutions Code section 602 petition to be true. The court commented: "The court feels that the evidence in this case is overwhelming. The court is satisfied beyond a reasonable doubt of count 1 of the petition; finds the . . . minor personally and

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<sup>4</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

intentionally discharged a firearm, which caused great bodily injury and death to Jasmine [S.] within the meaning of . . . section 12022.53(d), also causing the above offense to become a serious felony pursuant to . . . section 1192.7(c)(8), [and] any violent felony within the meaning [of] section 667 dash – point 6(c)(8). [¶] The court further find[s] that the minor personally and intentionally discharged a firearm within the meaning of [section] 12022.53(c), also causing the above offense to become a serious felony pursuant to section 1192.7(c)(8) [and a] violent felony within the meaning of section 667.5(c)(8).”

The court was also “satisfied beyond a reasonable doubt” that H.W. committed attempted willful, deliberate and premeditated murder. The court found that H.W. “personally and intentionally discharged a firearm within the meaning of section 12022.53(c), also causing the offense to become a serious felony pursuant to section 1192.7(c)(8), [and] any violent felony within the meaning of section 667.5(c)(8).” Finally, the court found that H.W. personally used a handgun within the meaning of section 12022.53, subdivision (b).

Disposition of the matter occurred at proceedings held on April 23, 2009. The juvenile court indicated that it had read and considered the probation report, then stated that it found the murder to be in the first degree. The court imposed a term of 25-years-to-life for the finding H.W. committed first degree murder. In addition, the juvenile court imposed a consecutive term of 25-years-to-life for the finding he discharged a firearm in violation of section 12022.53, subdivision (d). As to the attempted murder alleged in count 2, the juvenile court imposed a concurrent term of 25 years to life plus 20 years for the firearm use enhancement. The trial court then stated that it “further [found] that in arriving at the sentence, the Court ha[d] considered the facts and circumstances of the case, and . . . [found] that the minor [would] benefit from the training and other educational discipline provided by the Department of Juvenile Justice.” The court committed H.W. to the Department of Juvenile Justice for a theoretical maximum term of confinement of 50 years to life. The court ordered H.W. to pay a \$1,000 restitution fine (§ 1202.4) and awarded him presentence custody credit for 270 days.

H.W. filed a timely notice of appeal on April 28, 2009.

This court appointed counsel to represent H.W. on appeal on July 7, 2009.

### CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed November 9, 2009, the clerk of this court advised H.W. to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. In a letter filed February 23, 2010, H.W. indicated that he wished to testify at the proceedings held with regard to his appeal because he no longer felt that there was “honor in the ‘gang-banging’ code.” He claims he was the “youngest of ‘many’ ” involved in the shooting and, at the time, did not realize the consequences of taking the blame.

Although H.W. may now have decided that there is no honor in the “gang-banging code” of silence, his claim is not cognizable on appeal. Initially, the evidence he wishes to present cannot be characterized as “ ‘newly discovered.’ ” (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1322.) In addition, even if the evidence were newly discovered, his remedy would not be to bring his claim on appeal. He would, instead, be required to bring a petition for writ of habeas corpus. Even then, “ ‘[n]ewly discovered [or revealed] evidence is a basis for [habeas corpus] relief only if it undermines the prosecution’s entire case. It is not sufficient that the evidence might have weakened the prosecution case or presented a more difficult question for the judge . . . .’ ” (*Ibid.*)

In addition to H.W.’s claim, after reviewing the record this court requested that appellate counsel address the following issue: “Did imposition of sentence with regard to count two, as well as count one, violate the mandates of . . . section 654? If so, what is the remedy?” We find H.W.’s counsel’s response persuasive.

“[S]ection 654 bars multiple punishment not multiple convictions. It prohibits multiple punishment ‘where the convictions arise out of an indivisible transaction and have a single intent and objective.’ ” (*People v. Monarrez* (1998) 66 Cal.App.4th 710, 713, accord *People v. [Avalos]* (1996) 47 Cal.App.4th 1569, 1583.) At disposition in the

instant case, counsel for the minor argued that section 654 barred separate punishments for counts one and two. The juvenile court disagreed, but imposed concurrent terms not consecutive ones. [¶] In adult criminal proceedings, a sentence that violates . . . section 654 must be stayed even if it is imposed concurrently, because the defendant is deemed to be subject to the term of both sentences although they are served simultaneously. (*People v. Cruz* (1995) 38 Cal.App.4th 427[, 434].) In the juvenile court, by contrast, the courts have held that if the theoretical maximum length of a juvenile's potential confinement is not increased by the aggregation of his offenses, the considerations underlying . . . section 654 are not relevant. (See[,] e.g.,] *In re Michael B.* (1980) 28 Cal.3d 548, 556[-557]; *In re Billy M.* (1983) 139 Cal.App.3d 973, 978-979.) Thus, only if the terms are run consecutively, does . . . section 654 require that one of the offenses be stayed. (*In re Asean D.* (1993) 14 Cal.App.4th 467, 474.) If the terms are run concurrently, and thus have no effect on the maximum period of confinement, . . . section 654 is not applicable. (*In re Robert W.* (1991) 228 Cal.App.3d 32, 34.)”

### **REVIEW ON APPEAL**

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

**DISPOSITION**

The order committing H.W. to the California Department of Corrections and Rehabilitation Division of Juvenile Justice is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.